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Congressional Authorization and Oversight of International Fishery Agreements under the Fishery Conservation and Management Act of 1976

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NOTE

CONGRESSIONAL AUTHORIZATION AND OVERSIGHT OF INTERNATIONAL FISHERY AGREEMENTS UNDER THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976

The Fishery Conservation and Management Act of 1976[1] represents an attempt by Congress to deal with the problem of the exploited but unmanaged fishery resources off the coasts of the United States.[2] One of the most important elements of the new management scheme is the ability to control the volume of foreign fishing in the newly established 200-mile fishery conservation zone.[3] Instrumental in such control is the requirement that the Secretary of State negotiate international fishery agreements and renegotiate existing treaties with nations wishing to fish within the new zone.[4] Any foreign fishing within the fishery conservation zone is to be conducted pursuant to treaties or to governing international fishery agreements (GIFA's) containing binding commitments by foreign nations to comply with certain statutory conditions.[5] Once the GIFA's have been negotiated, the President is required to submit them to Congress.[6] If an agreement is disap-

1. 16 U.S.C.A. §§ 1801–1882 (West Supp. 1977).

2. One of the principal purposes of the Act is to stop the depletion of fishery resources caused by foreign vessels fishing adjacent to the United States coasts. Fishery Conservation and Management Act (FCMA) § 2(a)(3), 16 U.S.C.A. § 1801(a)(3) (West Supp. 1977).

3. The "fishery conservation zone" is defined as "a zone contiguous to the territorial sea of the United States," the outer boundary of which is approximately 200 miles from the coast. *Id.* § 101, 16 U.S.C.A. § 1811.

4. *Id.* § 202, 16 U.S.C.A. § 1822. If a treaty is not renegotiated within "a reasonable period of time," the Act states that it is the "sense of Congress" that the United States will withdraw from that treaty in accordance with its provisions. *Id.* § 202(b), 16 U.S.C.A. § 1822(b).

5. The Act specifies that each "governing international fishery agreement" must acknowledge the exclusive fishery management authority of the United States as set forth in the Act and comply with a number of terms and conditions specifically enumerated therein. *Id.* § 201(c), 16 U.S.C.A. § 1821(c).

6. The Act sets forth the following mechanisms for congressional review of the GIFA's:

> (a) No governing international fishery agreement shall become effective with respect to the United States before the close of the first 60 calendar days of continuous session of the Congress after the date on which the President transmits to the House of Representatives and to the Senate a document setting forth the text of such governing international fishery agreement. . . .

proved within sixty days of submission by a joint "fishery agreement resolution" originating in either House of Congress, it will not take effect.[7]

These provisions raise questions regarding the respective powers of the President and Congress in conducting the nation's foreign affairs. This note will examine three aspects of governing international fishery agreements as they reflect on the nature of those powers: (1) congressional power to authorize the agreements, (2) the delegation of legislative authority, and (3) congressional oversight of the GIFA's by use of the legislative veto.

I. CONGRESSIONAL POWER TO AUTHORIZE GIFA'S

It is expressed as the "sense of Congress" that the GIFA's "include a binding commitment, on the part of such foreign nation and its fishing vessels," to comply with specified conditions of the Act.[8] The use of the term "sense of Congress" indicates that the formation and control of international fishery agreements is not clearly within the power of Congress.[9] This uncertainty derives from the indefinite application of the separation of powers doctrine in the field of foreign affairs.

(b) Any document described in subsection (a) . . . shall be immediately referred in the House of Representatives to the Committee on Merchant Marine and Fisheries, and in the Senate to the Committees on Commerce and Foreign Relations.

Id. § 203, 16 U.S.C.A. § 1823 (captions omitted).

7. The Act provides as follows:

[T]he term "fishery agreement resolution" refers to a joint resolution of either House of Congress—

(A) the effect of which is to prohibit the entering into force and effect of any governing international fishery agreement the text of which is transmitted to the Congress pursuant to subsection (a) of this section; and

(B) which is reported from the Committee on Merchant Marine and Fisheries of the House of Representatives or the Committee on Commerce or the Committee on Foreign Relations of the Senate . . . .

Id. § 203(d)(2), 16 U.S.C.A. § 1823(d)(2). *See* note 66 *infra*.

8. *Id.* § 201(c), 16 U.S.C.A. § 1821(c).

9. The term "sense of Congress" is generally used when the matter in question is in an area of uncertain power distribution between the President and Congress, *e.g.*, the negotiation of international agreements. *See, e.g.*, Trade Act of 1974, 19 U.S.C. § 2132(d)(4) (Supp. V 1975) (expressing "sense of Congress" that President seek modifications in international agreements regarding balance of payment adjustments); Foreign Assistance Act of 1974, 22 U.S.C. § 2182a (Supp. V 1975) ("sense of Congress" that authority conferred by the Act be used to establish programs in Latin America to set up private banks and lending organizations). Similar expressions are used in foreign assistance provisions. *See id.* §§ 2194(a)(4)(A), 2225 (Supp. V 1975).

A. Constitutional Framework for Power To Act in Foreign Affairs

The doctrine of separation of powers, fundamental to the constitutional structure,[10] presents an irregular, uncertain division in the area of foreign relations.[11] The only independent presidential powers granted under the bare constitutional framework are the authority to receive ambassadors[12] and to act as Commander-in-Chief of the Armed Forces.[13] The additional allocated powers of making treaties and appointing ambassadors require the advice and consent of the Senate.[14] In contrast to this narrow delineation of presidential powers, the Constitution sketches a somewhat broader legislative authority for Congress in the realm of foreign relations: Congress has the power to regulate commerce with foreign nations,[15] to define offenses against the law of nations,[16] to declare war,[17] and to raise and support armies.[18]

Despite the limited scope of the President's constitutionally enumerated power in foreign affairs, his preeminence led the Supreme Court, in *United States v. Curtiss-Wright Export Corp.*,[19] to declare that the President is the "sole organ"[20] of the government responsible for for-

10. *See, e.g.*, Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L. Q. 13 (1974).

11. The history of foreign relations is replete with attempts to delineate clearly the powers of the President and of Congress and to define what constitutes usurpation by either governmental branch. *See* note 33 *infra*.

The struggle between the two branches results in part from the constitutional provisions that confer certain powers upon both the President and Congress, but do not give either branch decisive authority: "[T]he Constitution, considered only for its affirmative grants of powers which are capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy." E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 200 (2d ed. 1941).

For sources concerning the foreign relations power of the United States, see C. BUTLER, THE TREATY MAKING POWER OF THE UNITED STATES (1902); E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS (1917); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS (1922).

12. U.S. CONST. art. II, § 3.
13. *Id.* art. II, § 2, cl. 1.
14. *Id.* art. II, § 2, cl. 2.
15. *Id.* art. I, § 8, cl. 3.
16. *Id.* art. I, § 8, cl. 10.
17. *Id.* art. I, § 8, cl. 11.
18. *Id.* art. I, § 8, cl. 12.
19. 299 U.S. 304 (1936).

20. The Court quoted John Marshall, who later became Chief Justice: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 ANNALS OF CONG. 613 (1800). Marshall made this remark as a Congressman in support of the President's extradition of a man charged with murder. The President, who took the action without a judicial hearing under the pro-

eign relations. This statement, however, must be placed in its proper perspective. *Curtiss-Wright* was a case dealing with a broad delegation of *legislative* power to the President in the field of foreign affairs.[21] The Court upheld the delegation on the principle that federal power in the foreign affairs arena rests on a different and more exclusive basis than federal power in domestic affairs.[22] Thus, the broad assertions of *presidential* authority constituted dicta.[23]

In fact, the power of Congress to participate in foreign affairs compares favorably with the corresponding authority of the Executive. The Supreme Court has recognized that Congress, in addition to its enumerated powers,[24] has the authority to deal with matters of domestic concern that have international consequences.[25] The "neces-

visions of an existing treaty, had been attacked on the ground that this was a matter for the *courts* to decide. The participation of Congress in foreign affairs was not involved. Marshall asserted that the demand for extradition could only be made on the President, who was free to respond unless Congress authorized the mode of compliance. Thus, Marshall seemed to regard even this exercise of the President's power as subject to congressional control. *See* Berger, *The Presidential Monopoly of Foreign Relations,* 71 MICH. L. REV. 1, 17 (1972). One commentator has stated: "Clearly, what Marshall had foremost in mind was simply the President's role as *instrument of communication* with other governments." E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 208 (2d ed. 1941) (emphasis in original).

21. War had broken out between Paraguay and Bolivia in 1932. Congress passed a joint resolution which provided that the President, if he found that prohibiting the sale of arms would help to establish peace, could proclaim an embargo on American arms shipments to these two nations. The President issued an embargo proclamation. Curtiss-Wright Export Corp., indicted for violating the embargo, raised the defense that the joint resolution unconstitutionally delegated legislative power to the executive. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 307–08 (1936).

22. The Court had recently invalidated the National Industrial Recovery Act, ch. 90, §§ 1–304, 48 Stat. 195 (1933), as constituting an impermissible delegation of legislative power to the President. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1934). In order to uphold the congressional action in *Curtiss-Wright,* it was necessary to distinguish delegations of power in foreign affairs from those in domestic situations. The Court found that the powers of the federal government in foreign affairs did not derive from the Constitution, but were inherent in the nation as an attribute of sovereignty. Thus, somewhat broader delegations were held to be permissible.

23. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring); *Hearings on War Powers Legislation Before the Senate Comm. on Foreign Relations,* 92d Cong., 1st Sess. 485, 495–96 & n.47 (1971) (statement of Secretary of State William P. Rogers); Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases,* 34 AM. J. INT'L L. 690, 691 (1940).

24. *See* text accompanying notes 15–18 *supra.* Even the independent power of the President as Commander-in-Chief is subject to the congressional powers in art. I, § 8, to declare war (cl. 11), to raise and support armies (cl. 12), to provide and maintain a navy (cl. 13), and to "make Rules for the Government and Regulation of the land and naval forces" (cl. 14).

25. Included within this category are the congressional powers to exclude aliens, to regulate immigration, and to limit the freedom of action of American citizens in the interests of the nation's foreign relations. *See, e.g.,* Mackenzie v. Hare, 239 U.S. 299

sary and proper" clause of the Constitution also may furnish a foundation for implied congressional powers in foreign affairs.[26] The extensive constitutional authority delegated to Congress has even been described as constituting a "foreign affairs power" to legislate on matters of international concern.[27]

(1915) (deprivation of citizenship for having married alien); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (deportation of aliens); The Chinese Exclusion Case, 130 U.S. 581 (1889) (exclusion of Chinese laborers from United States); The Head Money Cases, 112 U.S. 580 (1884) (power to regulate immigration, based on Congress foreign commerce power).

26. The Constitution provides that Congress has the power to "make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. The Supreme Court has stated in dictum that "Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs. Latitude in this area is necessary to ensure effectuation of this indispensable function of government." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) (holding statutes divesting American of citizenship for evading military service unconstitutional for violating due process guarantees).

In the War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548 (Supp. V 1975), Congress relied upon the necessary and proper clause for its authority to limit the President's use of troops. The Senate Committee on Foreign Relations stated:

> It is also of great importance to note that the residual legislative authority over the entire domain of foreign policy—not just the war power—was placed in Congress by the Constitution. . . . Strictly interpreted, the "necessary and proper" clause entrusts the Congress not only to "carry into execution" its own constitutional war power, but also, should it be thought necessary, to define and codify the powers of the government as a whole, including those of the President as its principal officer.

S. REP. No. 606, 92d Cong., 2d Sess. 15–16 (1972).

27. The principal architect of the concept that Congress has a "foreign affairs power" is Professor Louis Henkin. *See, e.g.*, L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959); Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 COLUM. L. REV. 1151 (1956).

This power can be traced through the development of authority to regulate aliens. In the Chinese Exclusion Case, 130 U.S. 581 (1889), the Court upheld the power of Congress to exclude Chinese laborers on the basis of the United States inherent sovereign power to provide security against foreign aggression through *legislative* action. In Fong Yue Ting v. United States, 149 U.S. 698 (1893), the same "sovereign power" was held to authorize alien deportation: "The power to exclude or to expel aliens, *being a power affecting international relations,* is vested in the political departments of the government, and is to be regulated by treaty *or by Act of Congress . . . .*" *Id.* at 713 (emphasis added). *See also* Hines v. Davidowitz, 312 U.S. 52 (1941) (invalidating Pennsylvania's Alien Registration Act on the ground that it was preempted by federal legislation).

The language of these cases indicates that the power to act in foreign relations is derived from the sovereign status of the United States in international affairs, and that this power is not vested in any one branch of the federal government. *Cf.* De Geofroy v. Riggs, 133 U.S. 258, 266–67 (1890) (upholding Treaty of 1800 allowing French citizens to take land by descent in the District of Columbia). Thus, the power of Congress to deal with matters of international concern may derive from the same

B. *Treaties and Other International Agreements*

Treaties, which require the participation of both the President and the Senate, are the only form of international compact provided for in the Constitution.[28] Nevertheless, it has become common practice for the federal government to formulate international obligations through the use of other types of agreements not specifically authorized by the Constitution[29]—that is, the executive agreement and the congressional-executive agreement.

Executive agreements are negotiated and concluded on the sole authority of the President and do not require Senate consent.[30] They

source as the treaty-making power and may be coextensive therewith. *See* notes 44–46 and accompanying text *infra*.

It is interesting to note parenthetically that Madison, focusing on the powers of Congress to regulate foreign commerce and declare war, believed that under the constitutional framework activity in foreign affairs should be predominantly legislative in character. 6 THE WRITINGS OF JAMES MADISON 138, 147–50 (G. Hunt ed. 1906).

28. The Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2. The Senate may reject a treaty in its entirety, delay action until desired changes have been made, or consent to ratification provided specific amendments are included. *See* S. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 81 (2d ed. 1916).

The choice not to vest the treaty-making power solely in the hands of the President was based on the consideration that "it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years' duration." THE FEDERALIST No. 75 (A. Hamilton), *reprinted in* THE FEDERALIST PAPERS 449, 451 (Mentor ed. 1961). The power to make treaties was envisioned to be a combined function of two branches, with the Senate representing the interests of the individual states. *Id.* at 452.

29. In United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), Justice Sutherland stated that the power to make international agreements derives from the very sovereignty of this nation in foreign affairs:

> [T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. . . . [T]he power to make such international agreements as do not constitute treaties in the constitutional sense. . . . [which is not] expressly affirmed by the Constitution, nevertheless exist[s] as inherently inseparable from the conception of nationality.

Id. at 318–19. *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 117, Comment c. For another analysis supporting the constitutionality of international agreements other than treaties, see McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 216, 240 (1945).

The debate on the use of international agreements has been taken up by various authors. *See* Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972); Fitzgerald, *Executive Agreements and the Intent Behind the Treaty Power*, 2 HASTINGS CONST. L.Q. 757 (1975); Note, *Executive Agreements, The Treaty-Making Clause, and Strict Constructionism*, 8 LOY. L.A.L. REV. 587 (1975).

30. In United States v. Pink, 315 U.S. 203 (1942), the Court held that the Litvinov Assignment, an executive agreement not previously authorized by statute or treaty but entered into by the President pursuant to his independent constitutional powers, had "as much legal validity and obligation as if [it] proceeded from the legislature" and was as much a " 'Law of the Land' " as a treaty. *Id.* at 230. *See also*

generally are used in dealing with single events or matters of temporary concern.[31] Congressional-executive agreements, on the other hand, occur when Congress authorizes the Executive to enter into an international agreement on a subject which falls within Congress constitutional authority.[32]

Both types of agreements have equal validity for the purpose of binding the nation to an international commitment. However, congressional involvement is totally lacking in the formation of executive agreements.[33] In contrast, congressional-executive agreements, such as

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United States v. Belmont, 301 U.S. 324 (1937) (upholding the supremacy of the Litvinov Agreement over contrary state policy).

Several commentators have concluded that art. II, § 1, of the Constitution, which vests the "executive power" in the President, provides the principal constitutional basis for interpreting the presidential power to make executive agreements. *See* S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 102 (2d ed. 1916); Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States,* 35 ILL. L. REV. 365 (1940). *But see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

Although no court has ever held that the President may not conclude executive agreements pursuant to his *independent* constitutional powers, one court has indicated that these agreements may not relate to matters that fall within Congress constitutional powers. In United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds,* 348 U.S. 296 (1955), the court struck down an executive agreement between the United States and Canada concerning the export and import of potatoes. The court held that Congress has the exclusive authority to regulate foreign commerce, and thus the President cannot make any executive agreement which falls within this area.

31. *See* Sayre, *The Constitutionality of the Trade Agreements Act,* 39 COLUM. L. REV. 751, 755 (1939).

32. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 120 (1965) delineates the scope of congressional-executive agreements:

> An international agreement made by the United States as an executive agreement authorized by an act of Congress may . . . deal with any matter that falls within any of the powers of the Congress and the President under the Constitution, even if the matter also falls within the treaty power.

33. The exclusion of congressional participation has prompted Congress to register its concern and displeasure on numerous occasions. *See, e.g.,* S. 1251, 94th Cong., 1st Sess. (1975) (provision for Senate disapproval of executive agreements); S. 632, 94th Cong., 1st Sess. (1975) (provision for disapproval by concurrent resolution); S. 3830, 93d Cong., 2d Sess. (1974) (provision for disapproval by concurrent resolution); S. 3475, 92d Cong., 2d Sess. (1972) (same); Pub. L. No. 92–403, § 1, 86 Stat. 619 (codified at 1 U.S.C. § 112b (Supp. V 1975)) (requiring all international agreements to be submitted to Congress). *See also Congressional Oversight of Executive Agreements—1975: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. (1975); *Congressional Oversight of Executive Agreements: Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 92d Cong., 2d Sess. (1972); *International Executive Agreements: Hearing Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs,* 92d Cong., 2d Sess. (1972).

The most recent activity in Congress aimed at restricting executive agreements is the Treaty Powers Resolution which would require most significant executive agreements to be submitted as treaties to the Senate for its advice and consent. S. Res. 24,

the GIFA's, provide Congress with a role in the determination of foreign policy through the authorization of international agreements.[34]

C. *Congressional-Executive Agreements as the Basis for Authorization of GIFA's*

Congressional-executive agreements, like treaties and executive agreements, become the "law of the land."[35] However, because Congress has no independent power to negotiate directly with foreign governments, its constitutional authority to initiate these agreements is limited. Only when Congress has legislative power over the subject matter at issue can it make use of the presidential function of negotiating with foreign governments.[36] Accordingly, congressional-executive agreements involving matters within Congress enumerated powers have met with judicial approval.[37]

Among these enumerated constitutional powers is the power to reg-

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95th Cong., 1st Sess. (1977). The same resolution was introduced and hearings were held in the 94th Congress. *See Treaty Powers Resolution: Hearings on S. Res. 486 Before the Senate Comm. on Foreign Relations,* 94th Cong., 2d Sess. (1976).

34. Congress has authorized the executive branch to conclude international agreements since the early days of the nation. For example, in 1790 it empowered the President to borrow money from foreign countries to pay off the Revolutionary War Debt, ch. 34, § 2, 1 Stat. 138 (1790). Subsequent congressional-executive agreements have been used to conduct foreign trade, *e.g.,* Reciprocal Trade Agreements Act of 1934, 19 U.S.C. § 1351 (1970); and to sell or lease defense material to foreign governments, *e.g.,* Lend-Lease Act of 1941, ch. 11, § 3, 55 Stat. 31 (1941). *See also* 19 U.S.C. § 2131(b) (Supp. V 1975) (foreign trade); 39 U.S.C. § 407 (1970) (postal agreements); 42 U.S.C. § 2153 (1970) (atomic energy agreements).

35. *See, e.g.,* Cotzhausen v. Nazro, 107 U.S. 215 (1882); United States v. 18 Packages of Dental Instruments, 222 F. 121 (E.D. Pa. 1915); Mihalovitch, Fletcher & Co. v. United States, 160 F. 988 (C.C.S.D. Ohio 1908); United States v. Luyties, 130 F. 333 (2d Cir. 1904).

Furthermore, congressional-executive agreements supersede inconsistent state and federal laws as well as prior inconsistent treaties and executive agreements. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 175 (1972); 40 OP. ATT'Y GEN. 469 (1946) (stating that congressional-executive agreement would be equivalent to treaty and would constitute supreme law of the land).

36. The scope of an agreement executed pursuant to congressional authorization is limited by the "collective powers of the Congress and of the President." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 120, Comment a (1965). *See* note 32 *supra.*

37. *See* Field v. Clark, 143 U.S. 649 (1892) (upholding constitutionality of Tariff Act provision authorizing President to suspend import duty exemptions on articles unless reciprocity could be obtained with other nations); Cotzhausen v. Nazro, 107 U.S. 215 (1882) (upholding congressional-executive agreement to create postal conventions under congressional power to establish post offices, U.S. CONST. art. I, § 8, cl. 7); Star-Kist Foods, Inc. v. United States, 169 F. Supp. 268 (Cust. Ct. 1958), *aff'd,* 275 F.2d 472 (C.C.P.A. 1959) (sustaining validity of Reciprocal Trade Act of 1934, which empowered President to enter into foreign trade agreements as legitimate con-

ulate commerce with foreign nations.[38] Fishing within the "fishery conservation zone" and removing fish to a foreign country constitute the movement of goods and therefore should qualify as "commerce."[39] Even if this interpretation were subject to doubt, one could forcefully argue that the Supreme Court's broad interpretation of commerce in the interstate setting is equally applicable to foreign commerce.[40] Thus, Congress appears to have the authority under the foreign commerce power to authorize and delineate the contents of GIFA's and to require that existing fishery treaties be renegotiated to conform with the provisions of the Act.

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gressional enactment pursuant to constitutional powers to lay and collect duties and to regulate commerce). In *Star-Kist,* a concurring judge cited *Field* for the proposition that Congress has "the authority to authorize and and empower the President, under prescribed standards and upon specified limitations upon his discretion, to negotiate and conclude reciprocal trade agreements and to make them effective by proclamation." 169 F. Supp. at 287 (Mollison, J., concurring). The actual holding in each case was that the relevant statute was neither an unconstitutional delegation of legislative power nor a violation of the treaty-making clause.

38. U.S. CONST. art I, § 8, cl. 3.

39. The term "commerce" denotes not only the exchange of goods for other goods or for money, but also the movement of goods. Wabash, St. L. & P. Ry. v. Illinois, 118 U.S. 557, 574 (1886). One court has stated that the "[t]ransportation of . . . fish to . . . market at . . . [specified] cities from the high seas and territorial waters is commerce," and fishermen who provided the fish "were engaged in interstate and foreign commerce." Local 36 of Int'l Fishermen & Allied Workers of America v. United States, 177 F.2d 320, 326 (9th Cir. 1949).

40. The scope of Congress power over domestic commerce is illustrated by the decision in Wickard v. Filburn, 317 U.S. 111 (1942), which sustained federal authority to regulate the production of goods intended not for commerce but only for consumption on the farm. The Court held that even if the activity were local it could be reached by Congress if it exerted a substantial economic impact on interstate commerce. *See* Katzenbach v. McClung, 379 U.S. 294 (1964) (sustaining provision of Civil Rights Act of 1964 which prohibited racial discrimination in restaurants serving interstate travelers or in which substantial part of food served moved in interstate commerce); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding Civil Rights Act of 1964 as applied to hotel which practiced racial discrimination on grounds that such discrimination placed burden on interstate commerce); United States v. Darby, 312 U.S. 100 (1941) (upholding power to prohibit shipment of goods in interstate commerce if manufactured by employees whose wages were less than statutory minimum); United States v. Sullivan, 332 U.S. 689 (1948) (upholding statute which prohibited misbranding of drugs after shipment in interstate commerce). Chief Justice Marshall provided a similarly expansive reading of congressional power to control foreign commerce when he stated that it "comprehend[s] every species of commercial intercourse between the United States and foreign nations." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193 (1824).

Arguably, these decisions are inapposite. Whereas the issue presented in the above cases was whether Congress exercise of the power to regulate commerce was an unconstitutional encroachment on the sovereignty of the individual states, the present concern is whether such an exercise unconstitutionally infringes on the power of the Executive. The controversy in the former instance centers on principles of federalism; the latter concern is with separation of powers. Nevertheless, the federal-state controversy which has produced these sweeping rules at least provides analogic support for the asserted proposition.

Additional support for congressional power to regulate foreign fishing activity within the fishery conservation zone might possibly be found in the property clause of the Constitution, which provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[41] In a recent case the Supreme Court stated that "while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed '[t]hat the power over the public land thus entrusted to Congress is without limitations.' "[42] Although the managed fishery resources within the fishery conservation zone are neither within the territory of the United States nor on public lands, the Act's assertion of exclusive management jurisdiction from the edge of the territorial sea out to 200 miles may provide a sufficient "property" interest in the fishery resources to justify congressional control of foreign fishing within the conservation zone.[43]

The concept of a congressional "foreign affairs power"[44] further substantiates the authority of Congress to act in the area of international fishing. Because treaties and congressional-executive agreements constitute equally valid means of forming international obligations,[45] the power of Congress to authorize congressional-executive agreements arguably extends to all matters that are within the nation's treaty power, *i.e.*, to any matter of international concern which affects

41. Art. 4, § 3, cl. 2. *Cf.* Ashwander v. TVA, 297 U.S. 288 (1936).

42. Kleppe v. New Mexico, 426 U.S. 529, *petition for rehearing denied*, 97 S. Ct. 189 (1976) (upholding federal statute regulating wild horses and burros on public lands). For a discussion of the Court's broad interpretation of the property clause, see Note, *Expansion of National Power Under the Property Clause: Federal Regulation of Wildlife*, 12 LAND & WATER L. REV. 181 (1977).

43. It is doubtful, however, whether the property clause would be sufficient to justify the asserted jurisdiction over anadromous species beyond the fishery conservation zone, as such fish are completely beyond the United States geographic jurisdictional claim. FCMA § 102, 16 U.S.C.A. § 1812 (West Supp. 1977).

44. *See* note 27 and accompanying text *supra*.

45. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 175 (1972). The Supreme Court's decision in B. Altman & Co. v. United States, 224 U.S. 583 (1912), indicates that congressional-executive agreements and treaties may be interchangeable constitutional practices. The Court held that although such an agreement was "not technically a treaty requiring ratification," nevertheless

> it was an international compact, negotiated between the representatives of two sovereign nations and made in the name of and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. . . . We think such a compact is a treaty under the Circuit Court of Appeals Act . . . .

Id. at 601. *See also* Cotzhausen v. Nazro, 107 U.S. 215 (1882) (declaring that postal conventions have equal status with treaties as part of the law of the land).

the United States.[46] Thus, as there is little doubt that fishing rights are the proper subject of treaties,[47] they constitute appropriate subject matter for congressional-executive agreements.

II. DELEGATION OF POWER

When Congress authorizes another branch of the federal government to act for it, a question arises as to whether such authorization constitutes an impermissible delegation of a legislative function.[48] The concept of separation of powers prevents each branch from abdicating its authority by assigning it to another branch.[49] In domestic situations, the Supreme Court has stated that Congress, after defining policies and establishing standards, may leave factfinding and subordinate rulemaking to other branches.[50]

Due to the nature of international negotiations, the Court has recognized that a broader delegation of authority to the President in the area of foreign relations is often necessary.[51] Thus, although acknowledging that some specifications of standards and limitations are still

46. The Reporter's Note to RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 120 (1965) states:

> [D]elegated powers of the Congress under the Constitution are so extensive and so broadly interpreted by the courts as to suggest that Congress, acting under such powers (including the "necessary and proper" clause of Article I, section 8) can authorize the President to make an executive agreement relating to any matter of international concern.

47. *See, e.g.*, Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, [1966] 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

48. *See generally* Freedman, *Review: Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307 (1976).

49. For example, the Supreme Court has held that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested." Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

50. *See, e.g.*, Fahey v. Mallonee, 332 U.S. 245 (1947) (upholding statute granting an administrative body authority to formulate rules for home loan banks); Yakus v. United States, 321 U.S. 414 (1944) (upholding statutory authorization to Office of Price Administration to fix the maximum price of rents and services); United States v. Rock Royal Co-op Inc., 307 U.S. 533 (1939) (upholding statute authorizing Secretary of Agriculture to fix price of certain commodities).

The Court, however, has invalidated delegations of unqualified presidential authority. In Panama Ref. Co. v. Ryan, 293 U.S. 388 (1934), the Court struck down a provision of the National Industrial Recovery Act of 1933, which authorized the President to prohibit the transportation of petroleum in interstate and foreign commerce. *See also* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating NIRA provision authorizing President to approve "codes of fair competition").

51. In United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936), the Court stated: "[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President

required,[52] the Court has never invalidated any legislative authorization for the Executive to conclude international agreements on the grounds of unconstitutional delegation.[53] Under the Fishery Conservation and Management Act, Congress has circumscribed the authorization for the executive branch to negotiate GIFA's, not only by imposing conditions and guidelines,[54] but also by requiring submission of negotiated agreements for final congressional approval.[55] The Act has thus harnessed the delegation of legislative authority with stricter supervisory checks than are necessary to withstand an attack of impermissible delegation.

III. CONGRESSIONAL OVERSIGHT OF GIFA'S—THE LEGISLATIVE VETO

Although there are sufficient guidelines to satisfy any delegation of power objections, the provision of the Act that requires the transmission of GIFA's to Congress may be challenged as legislative usurpation of an executive function in violation of the separation of powers doctrine.[56] Section 203 of the Act requires the President to submit any negotiated GIFA to Congress; these GIFA's become effective unless disapproved within sixty days by a "fishery agreement resolution."[57]

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a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *See also id.* at 321–22; J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394 (1928) (upholding provision of Tariff Act of 1922 as valid delegation of power); Field v. Clark, 143 U.S. 649 (1891) (holding that President acting under authority of tariff act was simply acting as agent of Congress); Star-Kist Foods, Inc. v. United States, 169 F. Supp. 268 (Cust. Ct. 1958), *aff'd*, 275 F.2d 472 (C.C.P.A. 1959).

In some cases dealing with delegations which impinge on individual rights, the more stringent limitations of the domestic cases may apply. *See, e.g.*, Kent v. Dulles, 357 U.S. 116 (1958) (striking down delegation to Secretary of State of authority to limit travel by citizens outside United States on basis of beliefs and associations).

52. For example, in Zemel v. Rusk, 381 U.S. 1, 17–18 (1965), the Court stated that "[*Curtiss-Wright*] does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice." *See also* Consumers Union v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974).

53. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 118–20 (1972); L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW 70–71 (1976).

54. FCMA § 201(c), 16 U.S.C.A. § 1821(c) (West Supp. 1977).

55. *Id.* § 203, 16 U.S.C.A. § 1823.

56. Article I of the Constitution vests the legislative power in the Congress and article II vests the executive power in the President. James Madison stated in this regard: "The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law . . . . The entire legislature . . . can exercise no executive prerogative . . . ." THE FEDERALIST No. 47 (J. Madison), *reprinted in* THE FEDERALIST PAPERS 303 (Mentor ed. 1961).

57. *See* note 7 *supra*.

Provisions of this nature have been characterized as "legislative vetoes."[58] In general, such provisions deny the effectiveness of executive action taken pursuant to congressional-executive agreements if either or both Houses of Congress pass a resolution of disapproval.[59] Two constitutional objections to the use of the legislative veto have been advanced. First, it excludes the President from his proper role in the legislative process by preventing his use of the executive veto.[60] Second, it allows the legislature to intrude on the executive function of carrying out and implementing previously enacted legislation.[61]

The first objection is based on the principle that the Constitution vests the veto power over legislation exclusively with the President.[62] Once an act has been passed by Congress and signed by the President, the Constitution provides for no further congressional activity. The legislative veto, however, does allow Congress to exercise subsequent control over the subject matter. Furthermore, it often takes the form

58. *See* J. BOLTON, THE LEGISLATIVE VETO: UNSEPARATING THE POWERS (1977); Cooper & Cooper, *The Legislative Veto and the Constitution,* 30 GEO. WASH. L. REV. 467 (1962); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees,* 66 HARV. L. REV. 569 (1953); Newman & Keeton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?,* 41 CAL. L. REV. 568 (1953); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63 CAL. L. REV. 983 (1975); 37 OP. ATT'Y GEN. 56 (1933). The Supreme Court has not yet had occasion to adjudicate Congress use of the legislative veto on constitutional grounds. In Buckley v. Valeo, 424 U.S. 1 (1976), the issue was explicitly raised by the parties, but the Court disposed of the case on other grounds.

59. *See, e.g.,* Military Construction Authorization Act of 1967, 10 U.S.C. § 2662 (1970) (no military installation to be closed until 30 days after Secretary of Defense reports to Congress); Atomic Energy Act of 1974, 42 U.S.C. §§ 2153–2154 (1970) (agreements for nuclear cooperation not to become effective if Congress passes concurrent resolution of disapproval during 60-day period following transmission to committee). *See also* notes 63–64 *infra;* Trade Act of 1974, 19 U.S.C. § 2112 (Supp. V 1975); War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1547 (Supp. V 1975). Presidents have vetoed bills because of a "legislative veto" provision contained therein. *See* 10 WEEKLY COMP. OF PRES. DOC. 1279 (Oct. 21, 1974) (President Ford's veto of amendment to the Atomic Energy Act of 1954); H.R. Doc. No. 272, 89th Cong., 1st Sess. (1965) (President Johnson's veto of the Military Construction Bill of 1965); H.R. Doc. No. 133, 82d Cong., 1st Sess. (1951) (President Truman's veto of the Defense Land Transfer Bill of 1951). For an extensive catalogue of statutes in which the legislative veto has been authorized, see Watson, *supra* note 58, at 1089–94.

60. *See, e.g.,* C. PRITCHETT, THE AMERICAN CONSTITUTION 330–32 (2d ed. 1968).

61. *See* J. BOLTON, *supra* note 58, at 31.

62. Art. I, § 7, states:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . . .
>
> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives . . . .

of a simple resolution of one House[63] or a concurrent resolution of both Houses,[64] neither of which is subject to a presidential veto.[65] However, this objection is not applicable to the Act. Section 203 specifically defines a fishery agreement resolution to be a joint resolution,[66] requiring it to be submitted to the President for a possible veto,[67] and thus preventing Congress from legislating in an unconstitutional manner.[68]

63. For examples of statutes providing for simple resolutions, see Reorganization Act of 1949, 5 U.S.C. § 906(a) (1970); Arms Control and Disarmament Act of 1961, 22 U.S.C. § 2587 (1970); Act of June 30, 1932, ch. 314, § 407, 47 Stat. 414.

64. Examples of statutes providing for concurrent resolutions can be found in the Export Import Bank Amendments of 1974, 12 U.S.C. § 635(e) (Supp. V 1975); Trade Act of 1974, 19 U.S.C. §§ 2191–2193 (Supp. V 1975); Atomic Energy Act of 1954, 42 U.S.C. §§ 2153–2154 (1970); Mutual Defense Assistance Act of 1949, ch. 626, § 405(d), 63 Stat. 718 (repealed 1954).

65. It has been suggested that the President waives objections to the legislative veto by signing legislation that embodies the mechanism. *See* Cooper & Cooper, *supra* note 58, at 478; Sale, Constitutional and International Legal Implications of the Proposed Marine Fisheries Conservation Act of 1975, *reprinted in* SENATE COMM. ON COMMERCE & NAT'L OCEAN POLICY STUDY, 94TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, 847, 848–49 (Comm. Print 1976). However, the general consensus appears to be that "no matter what the President does, his actions cannot protect the legislative veto if it is otherwise invalid." J. BOLTON, *supra* note 58, at 30. This view is implicit in Buckley v. Valeo, 424 U.S. 1 (1976) (presidential appointment power).

66. FCMA § 203(d)(2), 16 U.S.C.A. § 1823(d)(2) (West Supp. 1977). This terminology is somewhat ambiguous because a joint resolution is, by definition, an action of both Houses of Congress. *See* note 67 *infra*. It is reasonably certain that the wording contemplates a resolution which *originates* in either House and is then submitted to the other House for consideration and approval.

Section 206 of H. R. 200, the Marine Fisheries Conservation Act of 1975, a precursor of the Act, authorized a "resolution of disapproval" of *either* House of Congress. *See* H.R. REP. No. 445, 94th Cong., 1st Sess. 58–60 (1975). In a memo concerning H.R. 200 to Congresswoman Leonor K. Sullivan, Chairperson of the Committee on Merchant Marine and Fisheries, Michael Uhlmann, Assistant Attorney General, stated: "Nor in our view can Congress prevent executive agreements from coming into force by a resolution of disapproval passed by a simple majority of either House." Letter from Assistant Attorney General Michael Uhlmann to Congresswoman Leonor K. Sullivan (Feb. 24, 1976) (on file at *Washington Law Review*). Thus, although there is no legislative history to help clarify the matter, it seems that the use of the joint resolution format in the final version of the Act was designed to eliminate this potential problem.

67. A joint resolution "requires the approval of both houses and the signature of the President, just as a bill does and has the force of law if approved." CONGRESSIONAL QUARTERLY, GUIDE TO THE CONGRESS OF THE UNITED STATES 105–06 (1971). It is generally used in dealing with matters of limited importance. *Id.* at 106. *See also* SENATE COMM. ON RULES & ADMINISTRATION, SENATE MANUAL, S. DOC. No. 1, 94th Cong., 1st Sess. 15 (1975). Concurrent resolutions "must be passed by both houses but do not require the signature of the President and do not have the force of law." CONGRESSIONAL QUARTERLY, *supra* at 106. They are generally used for matters affecting the operations of both houses, such as fixing the time of adjournment. *Id.* at 106. *See also* C. PRITCHETT, *supra* note 60, at 330.

For a discussion of the development of the use of these various forms of congressional resolutions and their constitutional implications, see Ginnane, *supra* note 58, at 570–75; Watson, *supra* note 58, at 995–1000.

68. One critic of the legislative veto has stated: "Once responsibility passes to the

The second objection to the legislative veto is based generally on the concept of separation of powers, and particularly on the provision in article II, section 3 which states that the President "shall take Care that the Laws be faithfully executed." The argument is that Congress, through the use of the legislative veto, is reserving the right to decide whether or not executive action taken pursuant to the law shall be carried out, and is therefore attempting to "execute" the laws itself. Although the Supreme Court has stated that a legislative assumption of the executive function would violate the separation of powers doctrine,[69] the Act can be viewed, not as vesting Congress with executive functions, but as enabling it to retain a measure of control over the power it has delegated. When the President exercises sanctioned authority, he may be considered the agent of Congress and subject to those controls deemed necessary by the principal.[70] Therefore, because Congress can empower the President to conclude GIFA's,[71] it arguably may condition the granting of such authority on subsequent congressional approval.[72]

This line of reasoning does not fully confront the criticism that Congress nevertheless acts unconstitutionally when it reserves the

executive, however, Congress *cannot* take that responsibility back unless it is willing to submit to the possibility of a presidential veto." J. BOLTON, *supra* note 58, at 32 (emphasis in original). The negative implication of this statement is that if Congress does provide for such a possibility, as it has through the "fishery agreement resolution" mechanism, the constitutional issue disappears.

69. In Springer v. Philippine Islands, 277 U.S. 189, 202 (1928), the Supreme Court stated: "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement." In that case the Philippine legislature had created corporations and retained ownership of most of the stock. The power to vote the stock was vested in a committee consisting of members of the legislature. The Supreme Court held that voting the stock was solely an executive function and that delegation of this function to legislative officers was in violation of the separation of powers doctrine.

70. Professor Henkin, in discussing this argument, has stated that under such circumstances "Congress is not repealing or modifying the original legislation . . . . Surely Congress should be able to recapture powers it delegates to the President without the consent of the agent." L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 122 (1972). *See also,* Cooper & Cooper, *supra* note 58, at 475–76.

71. *See* text accompanying notes 38–47 *supra.*

72. *See* Cooper & Cooper, *supra* note 58, at 475–76. Congressman Elliott Levitas recently stated: "The fact that Congress, when it passes an act, delegates certain authority does not mean that it is relinquishing that authority and it can condition the exercise of that authority by any means it so desires." *Improving Congressional Oversight of Federal Regulatory Agencies: Hearings Before the Senate Comm. on Government Operations,* 94th Cong., 2d Sess., 192 (1976). *See also Congressional Oversight of Executive Agreements—1975: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. 272–77 (1975) (memorandum prepared by David M. Sale, Legislative Attorney for the American Law Division).

right to decide the manner in which the President may execute the laws. However, this criticism is not persuasive when applied to the Act. The uncertain division of foreign affairs powers and the importance of regulating foreign fishing within the fishery conservation zone both militate against rigid compartmentalization of legislative and executive functions.[73] In circumstances which require delegating large amounts of power to the President, congressional oversight is an appropriate instrument to ensure effective and proper utilization of that power.[74]

Finally, it is possible to interpret section 203 of the Act as setting forth a "report-and-wait" mechanism;[75] that is, the President must submit the fishery agreement to Congress and then wait a specified period of sixty days before the agreement goes into effect. Under such a procedure, executive action is disapproved by enacting new legislation in the form of fishery agreement resolutions, which are approved by both Houses and the President.[76] Thus, the President is not barred

73. A report on the constitutionality of the Act's congressional veto stated that in matters such as fishery management, where traditional oversight mechanisms have proven ineffective, Congress must exercise some type of effective, operative control unless it is to legislate in prohibitive detail or abdicate its legislative power. LEGISLATIVE HISTORY, *supra* note 65, at 849. It then quoted the following passage from Justice Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952):

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Id. at 635.

74. The congressional role in prior fishery agreements has been limited to an after-the-fact examination; the agreements were not subject to ratification because they were not submitted as treaties. A House report on an earlier version of the Act reported that, because of the perceived failure of previous agreements,

> there is an overwhelming need to insure that the utterly bankrupt negotiating procedures of the past decade are not repeated after enactment of this Act. No longer will it be necessary for the United States to go, hat in hand, to foreign capitals to give concessions in return for minimal recognition of conservation principles by the many foreign nations fishing off our shores. . . .
>
> . . . .
>
> . . . [T]hese procedures [for congressional review of GIFA's] recognize that the oversight role of Congress cannot be effectively undertaken unless there is adequate review and deliberation before these agreements become a reality.

H.R. REP. No. 445, 94th Cong., 1st Sess. 59–60 (1975), *reprinted in* LEGISLATIVE HISTORY, *supra* note 65, at 1112.

75. *See* Ginnane, *supra* note 58, at 577–78, 601–03; J. BOLTON, *supra* note 58, at 41–43.

76. *See* notes 66–67 and accompanying text *supra*.

from the legislative process, and there is no infringement of his executive function.[77]

IV. CONCLUSION

The authority of Congress to provide for international fishery agreements can be based either on its constitutional power to control foreign commerce or its foreign affairs power in matters of international concern. Moreover, the Act's purpose of imposing controls on both domestic and foreign fishing emphasizes the importance of congressional involvement in the implementation of a total management program.

This new legislation is significant, not only for its establishment of a 200-mile fishery conservation zone and a management authority, but also as a reflection of the tension between the Executive and Congress over the authority to conduct foreign relations.[78] The Act's use of the "legislative veto," although subject to serious constitutional doubts in some settings, appears defensible from both a constitutional and policy perspective as a means of retaining some degree of control over the authority created by the legislation. Although the marked absence of judicial precedent renders any prediction speculative, it appears relatively certain that the provisions of the Act pertaining to international fishery agreements would survive a constitutional challenge.

E. Susan Crystal

77. Even an outspoken critic of the legislative veto has commented that the "report-and-wait mechanism is probably constitutional" because, "[u]nlike the legislative veto, it does not exclude the President from the legislative process." J. BOLTON, *supra* note 58, at 41. The slight amount of judicial authority appears to be in accord. In Sibbach v. Wilson & Co., 312 U.S. 1, 15 (1940), the Court commented favorably on the report-and-wait procedure under which the Federal Rules of Civil Procedure were promulgated. In Clark v. Valeo, 45 U.S.L.W. 2349 (D.C. Cir. Jan. 21, 1977), an action was brought to challenge the legislative veto provisions of the Federal Election Campaign Act. The court stated that the report-and-wait procedure was constitutional before it concluded that the issue of the legislative veto was not in fact ripe for decision.

78. Senator Warren G. Magnuson, one of the prime movers behind the Act, has stated: "In my view, this legislation presented a classic confrontation between the executive and legislative branches of our government in the area of foreign affairs." Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427, 438 (1977).